BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

1. The Oregon Constitution preserves the accepted role of the jury as factfinder 5

2. The Due Process Clause of the Fourteenth Amendment does not displace a state jury from its traditional and well-established role 8

3. Oregon trial and appellate practices meet due process requirements while upholding juries as legitimate factfinders 11

CONCLUSION 17

TABLE OF AUTHORITIES

Cases: **Page**

Andor v. United Air Lines, 303 Or. 505, 739 P.2d 18 (1987) 15-17
Chicago, R.I. & Pac. Ry. Co. v. Cole, 251 U.S. 54 (1919) 8
Davis v. Tyee Industries, 295 Or. 467, 668 P.2d 1186 (1983) 12
Day v. Woodworth, 54 U.S. (13 How.) 363 (1852) 5
Dimick v. Schiedt, 293 U.S. 474 (1935) 17
Holden v. Pioneer Broadcasting Co., 228 Or. 405, 365 P.2d 845 (1961), *cert. denied*, 320 U.S. 157 (1960) 12
Huckle v. Money, 95 Eng. Rep. 768 (C.P. 1763) 5
Isaac v. Intercoast Sales Corporation, 7 N.E.2d 216 (1937) 7
Kennon v. Gilmer, 131 U.S. 22 (1889) 5
Louisville Railroad Co. v. Woodson, 134 U.S. 614 (1889) 7-8
Mathews v. Eldridge, 424 U.S. 319 (1976) 10
McKane v. Durston, 153 U.S. 684 (1894) 10
Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1919) 9
Ortwein v. Schwab, 410 U.S. 656 (1972) 10
Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1 (1991) 1-2, 11-12
St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38 (1935) 9-10
Schmidt v. Pine Tree Land Dev., 291 Or. 462, 631 P.2d 1373 (1981) 12
Standard Oil Co., v. Missouri, 224 U.S. 270 (1912) . . . 10
TXO Production Corp. v. Alliance Resources Corp., 113 S.Ct. 2711 (1993) 2, 11
Van Lom v. Schneiderman, 187 Or. 89, 210 P.2d 461 (1949) 7
Wiebe v. Seely, Adm., 215 Or. 331, 335 P.2d 379 (1959) 12

TABLE OF AUTHORITIES (Cont.)

Constitutional Provisions, Statutes and Rules: **Page**

Seventh Amendment 7, 10
Fourteenth Amendment 2
Article I, § 17, Or. Const. 7
Art. VII, § 3, Or. Const. . . . . *passim*
ORCP 18 12
ORCP 18B 13
ORCP 21A(8), 21D 12
ORCP 47A 13
ORCP 57 13
ORCP 60 13
ORCP 61 . . . . . 3, 14
ORCP 64 B(1) and (2) 15
ORCP 64B(5) 15
ORS 30.925 . . . . . 13, 14, 17
ORS 41.315(2) 13

Miscellaneous:

Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (1966) 15
Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 Geo. Wash. L. Rev. 723 (1993) 15
Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 Colum. L. Rev. 142 (1991) 7
The Oregonian, December 2, 1910, p. 9 6
Pamphlet Containing a Copy of All Measures . . . Submitted . . . at the Regular General Election . . . on the Eighth Day of November, 1910, pp. 176-77 7
Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L. J. 859 11
Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983) 4, 11

INTEREST OF *AMICUS CURIAE*

The Oregon Trial Lawyers Association is an organization of 800 attorneys in Oregon who represent claimants in products liability cases and other civil actions. OTLA has a strong interest in preserving the finality of jury verdicts on issues of fact and Oregon's system of allocating roles between judge and jury in civil litigation. OTLA therefore submits this brief in support of respondent's position.[1]

INTRODUCTION

Honda casts this case as a procedural challenge. Honda does not attack Oregon's substantive law. It levels its attack on Oregon's system of adjudication as a denial of procedural due process.

This brief defends Oregon's courts against that attack. It shows that Oregon provides the full panoply of procedural guarantees, including judicial review of the evidentiary basis of the factual predicates of punitive damages or other facts found by juries. Oregon courts follow the familiar division of review of issues of law (such as the standards for punitive damages) and issues of fact (for evidence), if only a litigant takes advantage of the opportunity offered by the procedural system. Honda failed to do that in this case.

Unsatisfied or unsuccessful with a full range of civil jury trial and judicial review procedures — a properly instructed jury fully informed of the legal standards which control a punitive damages award as approved by this court,[2] with three levels of state court review of the sufficiency of the evidence to support the verdict and review of all legal issues Honda chose to raise — Honda now claims a constitutional entitlement to "judicial excessiveness review." According to Honda, this is a Fourteenth Amendment mandate that state judges must reweigh the evidence considered by the jury because only this can ensure a damage award that is not "excessive." But this claim goes well beyond procedure.

---

[1] Counsel for both the petitioners and the respondent have consented to the filing of this brief. Their consents are on file with the Clerk.

[2] *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 21-2 (1991).

Honda's argument is founded on two premises: One, that a properly instructed jury, deciding the case on the correct substantive standards controlling a damages award and basing those standards on adequate evidence, may render a constitutionally "excessive" verdict. Two, that only post-verdict judicial reevaluation of the evidence can fix it.

The first may be a problem but not in this case. It can be remedied by judicial review, as a question of law, of whether the award breaches the Fourteenth Amendment's substantive limit which this Court recognized in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993).[3]

The second is the heart of the matter. If Honda merely seeks to displace one factfinder (the constitutionally designated one) with another (the judge), the Fourteenth Amendment, which does not specify any tribunal or official for factfinding, does not compel such review. On the other hand, if Honda expects a judicial officer to bring something more to the equation, that something can only be different legal standards about what is "excessive." If a judge knows what the standards are, a judge can articulate them. If a judge can instruct the jury, the jury can and should apply them to the evidence.

Whatever the legal standards are for awarding punitive damages, they cannot be different for a judge than a jury. They need not be mathematically precise. They may describe a range of permissible outcomes rather than a single result. They may make it possible that different judges and different juries could reach different outcomes on the same evidence.

Substantive due process confines the standards a state may use in directing the jury's damage award. This Court has addressed the standards relevant to a punitive damage award in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), and the jury below was instructed under a statute that met these standards.

---

[3] Five members of this Court agreed that the Due Process Clause imposes substantive limits "beyond which penalties may not go." *TXO*, 113 S. Ct. at 2718. The Oregon Supreme Court reviewed this award for compliance with substantive due process limits and upheld it. Pet. App. 29a. Honda disavows that it raises a substantive due process claim in this case. Reply Brief for the Petitioners at 2, 7.

Honda did not at trial and cannot here dispute the legitimacy or completeness of the legal standards upon which the jury was instructed for this damage award. If some other legal standards would further protect Honda from an excessive verdict, it was free, under Oregon procedures, to state them, to urge the trial judge to instruct accordingly, and to challenge any refusal to do so as legal error in post-judgment motions and on appeal.

Honda urges, sporadically, before this Court that the jury instructions on punitive damages were inadequate.[4] These complaints wobble between attacks on the instructions as given (for failing to tell the jury the weight or exclusivity of the standards), and complaints about standards not given (for failing to include the range of punishments imposed on comparable wrongdoers). Honda did not present these claims to the Oregon courts, which would have given them full review as issues of law.[5] Honda's opportunity to assert any of these claims has come and gone. And because, as Honda so assiduously argues, this is not a substantive due process case, the legal standards that control the factfinders' discretion are not at issue here.

Nor does Honda dispute in this Court the sufficiency of the evidence to support this damage award.[6] Honda could have requested a special verdict form specifying the jury's answer to the statutory criteria for its award, ORCP 61, and in this way test with great precision the sufficiency of the evidence on each element. But it did not do so.

Having been afforded a full spectrum of procedural protections, Honda urges nothing less than a federal

---

[4] *See, e.g.*, Petition for a Writ of Certiorari at 10, 24, 32; Reply Brief for the Petitioners at 3, n.3, urging this Court to urge the Oregon Courts to develop unspecified "common law excessiveness standards."

[5] *See* Pet. App. 22a n.11; pp. 13-14 & n.17, *infra*.

[6] The Oregon courts found sufficient evidence to support the verdict. *See* Pet. App. 26a-29a, 82a-87a. Honda raises an attack in this Court on the sufficiency of the evidence to support the jury's decision that it acted "wantonly," an attack that it claims "raises serious substantive due process questions," Reply Brief for the Petitioners at 3-4 n. 4, yet in virtually the same breath Honda disclaims any reliance on substantive due process. See note 3, *supra*.

constitutional principle that a state must set aside a verdict as "excessive" whenever a reviewing court thinks it is. This is a freewheeling and insupportable view of due process, and hardly a principle upon which to dismantle eighty years of Oregon trial and appellate procedure. Oregonians' decision to disallow their judges to reweigh facts found by a jury and supported by the evidence does not violate the Fourteenth Amendment.

SUMMARY OF THE ARGUMENT

1. This case is not about one state's "aberrant" procedures. It concerns the distribution of factfinding responsibilities between judge and jury. By constitutional amendment, facts found by Oregon juries may not be "re-examined" by state judges so long as evidence supports them. Art. VII, § 3, Or. Const.[7] The Oregon Constitution captures a balance of authority between judge and jury rooted in history and constitutional first principles. Defendant's argument that due process *requires* a judge to displace the jury's finding of fact completely ignores this balance.

2. There is no support for Honda's position that due process requires a state court judge to make an independent evaluation of any factual issue, including the amount of damages, after a properly instructed jury has reached a verdict based on the evidence.[8] Well-established law is to the contrary. Indeed, Honda's challenge to the legitimacy of factfinding by other than a judge calls into question settled law for administrative and criminal as well as civil procedures. At bottom, due process requires fair procedures ensuring a fair outcome. Whatever

---

[7] Article VII, § 3 of the Oregon Constitution provides in relevant part:

> In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

[8] Even critics of the jury system of assessing punitive damage awards do not suggest that due process requires judges to assess damages. *See, e.g.*, Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va L Rev 269, 302-3 (1983), quoted *infra* note 13.

procedural guarantees it offers must be available to plaintiffs as well as defendants.

3. This court's concerns about punitive damage awards are best addressed by legislative and not judicial solutions, and Oregon's legislature has acted. Beginning in 1977 the Oregon legislature has been codifying and modifying the common law of products liability. In 1979 the legislature prescribed the comprehensive controls on punitive damages which were applied in this case — an enhanced standard of proof, evidentiary restrictions to protect wealthy defendants, and the detailed criteria which a jury must be told to apply.

ARGUMENT

1. The Oregon Constitution preserves the accepted role of the jury as factfinder.

The jury has long been responsible to set damage awards in civil cases. *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763). The federal courts, reflecting this unchallenged state of affairs, have treated damage awards as an integral part of jury factfinding. *See, e.g., Kennon v. Gilmer*, 131 U.S. 22, 29 (1889) (holding that, with regard to damages for pain and suffering, "in a case in which damages for a tort have been assessed by a jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury."); *Day v. Woodworth*, 54 U.S. (13 How.) 362, 371 (1851) (noting that the assessment of punitive damages "has always been left to the discretion of the jury, as the degree of the punishment to be thus inflicted must depend on the peculiar circumstances of each case.").

The drafters of Article VII, § 3 saw this constitutional amendment as a guarantee that the jury's verdict would remain effective. It would keep the law consistent with what they perceived to be the common law rule, rather than permitting the

gradual expansion of judicial power to set aside or modify a jury's factual conclusions. As Judge O'Day, one of the authors, stated:

> For 75 years after the Constitution of the United States was adopted the courts generally held that a verdict of the jury should not be disturbed provided there was any competent evidence to support the verdict.

The Oregonian, December 2, 1910, at 9.

The premise, the judge said, was that twelve jurors "selected from the body of the community are more competent to pass upon and determine rightly a question of fact than any one member of the community, even though that person be a judge," and the result of their verdict reflects "the general sentiment of the community as to what the facts are." *Id.* Therefore the judge has the duty

> to see that proper evidence is admitted and improper evidence is excluded and that the jury is properly directed as to the issue of law and when that is done he has done all that the law requires him to do and the responsibility for a result as to the facts is to be left entirely to the jury.

Id.

In addition, the proponents felt that "controversies ought to end some time and the public ought to know by what tribunal these controversies are to be determined." *Id.*

> This idea that there are two or three tribunals to try questions of fact and one can reverse the other and vice versa makes litigation everlasting. It is a process by which the expenses eat up both the lawyers and the clients.

Id.

On this ground, the measure's advocates found support from then President (later Chief Justice) William Howard Taft, who had urged reform of a system where "the man with the longest purse has the advantage, because the litigation is drawn out." One purpose of the amendment was "to make that kind of injustice impossible in which the corporation or the rich man

wins because of the longest purse."[9]

Thus Article VII, § 3 of the Oregon Constitution was enacted to preserve the constitutional and common law expectation that juries should decide the facts and their decision should be final absent a showing of legal error. This move to protect the jury's decision from encroachment and revision by the judiciary was not an uncommon sentiment for the time.[10] To continue to abide by these origins should not be a constitutional deficit today.

We need not guess at the legitimacy of juries as competent factfinders. The constitutions make them so. Article I, § 17, Oregon Constitution; Seventh Amendment, U.S. Constitution. The jury's factfinding responsibility has always encompassed the assessment of damages. As the Oregon Supreme Court observed in *Van Lom v. Schneiderman,* 187 Or. 89, 95, 210 P.2d 461 (1949), this point "has not been disputed, and cannot be." From this the court reasoned that a judge's determination of the "excessiveness" of a verdict is a reevaluation of fact. Because Article VII, § 3 of the Oregon Constitution says "no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict," *Van Lom* prohibits a trial judge from substituting the judge's opinion of the evidence so long as the facts found by a jury are supported by evidence. The Due Process Clause requires no more.

---

[9] Pamphlet Containing a Copy of All Measures . . . Submitted . . . at the Regular General Election . . . on the Eighth Day of November, 1910, at 176-77.

[10] In addition to the Tennessee prohibition on more than two retrials, upheld in *Louisville Railroad Co. v. Woodson*, 134 U.S. 614 (1889), an 1898 Ohio statute disallowed trial courts from granting more than one new trial in the same case "on the weight of the evidence." Its 1908 amendment, preventing appellate courts from doing the same thing, was motivated by the sentiment "one trial and one review" and was upheld in *Isaac v. Intercoast Sales Corporation,* 7 N.E.2d 216, 219 (Ohio 1937). Indeed, similar sentiments inform the Seventh Amendment as well: "Antifederalists expressed a specific desire for juries to be able to control damage awards, including punitive damages, in order to defend the people against deliberate invasions of their legal rights by government officials or economically superior citizens." Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power,* 91 Colum. L. Rev. 142, 144 (1991).

2. The Due Process Clause of the Fourteenth Amendment does not displace a state jury from its traditional and well-established role.

Due process does not constrain the States to any particular balance of functions between judge and jury. *Chicago, R.I. & Pac. Ry. Co. v. Cole*, 251 U.S. 54 (1919), upheld the Oklahoma Constitution against a due process challenge. The state constitution declared that issues of contributory negligence and assumption of risk shall "at all times, be left to the jury." 251 U.S. at 55. The court was not distracted by the defendant's argument about issues of law and issues of fact, focusing instead on the crux of the matter: that the state constitution left the question entirely to the jury. This, according to the court, was fine:

> There is nothing . . . in the Constitution of the United States or its Amendments that requires a State to maintain the line with which we are familiar between the functions of the jury and those of the Court.

Id. at 56.

When asked explicitly whether due process required state judges to reweigh the facts and to impose their own opinion on the propriety of a damage award supported by the evidence, this Court said no. *Louisville Railroad Co. v. Woodson*, 134 U.S. 614 (1889), upheld a Tennessee statute against a Fourteenth Amendment challenge that claimed, as a part of due process, entitlement to a trial judge's review of the weight of the evidence and a new trial if, in the judge's opinion, the evidence did not justify the verdict. At issue was a statute which prevented "[n]ot more than two new trials . . . in any action at law." 134 U.S. at 619. This Court held that the statute could be interpreted to comport with the Due Process Clause if it was understood to mean that

> whenever the statute is applied, it must be upon the assumption that although the court would have found a different verdict, because of the weakness of the evidence, yet *there was some evidence* tending to establish the cause of action.

Id. at 623 (emphasis added).

This Court carried the same idea into the administrative law context in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1935). The case was framed by caselaw, most notably *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1919), establishing that due process required a state to submit an administrative agency's ratemaking decision to judicial review, as to both the law and the facts, so that a judge may exercise independent judgment. The premise was that whenever constitutional rights were at stake (in ratemaking cases, takings claims were common) due process required a judicial tribunal to decide the case "upon its own independent judgment as to both law and fact." 253 U.S. at 289.

St. Joseph Stock Yards dispensed with this requirement, recognizing in a later era the legitimacy of agencies duly empowered and directed by legislatures. The Court held that so long as agencies met the procedural requirements of due process, their findings of fact may be considered conclusive, due process is met by "according a fair hearing and acting upon evidence and not arbitrarily." *Id.* at 51. These requirements having been met,

> the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

Id. Justice Brandeis, concurring, elaborated on the due process requirement, with express application both to jury and to agency factfinders:[11]

> The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no

---

[11] Justice Brandeis assumed that the Seventh Amendment prohibits a judge from overturning a jury's finding of fact if it is supported by substantial evidence. He asked rhetorically why the factfinding of qualified agency administers should not likewise be conclusive, so long as supported by the evidence. 298 U. at 73.

> finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.

Id. at 73. Justice Brandeis further stated:

> The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly. . . . But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court.

Id. at 84.

Nor has due process yet been held to require the States to provide an appeal of any kind. *McKane v. Durston,* 153 U.S. 684, 687-88 (1894) (criminal proceeding); *Standard Oil Co. v. Missouri*, 224 U.S. 270, 286-87 (1912) (original proceeding adjudicated by state supreme court); *Ortwein v. Schwab,* 410 U.S. 656, 660 (1972) (administrative proceeding).[12]

Thus, Article VII, § 3, which requires state judges to uphold facts supported by evidence, fully comports with due process.

But recent opinions of this Court cast doubt on the traditional practice of allowing a jury to award punitive damages without standards to guide discretion. When factfinding requires the exercise of discretion, as unliquidated and punitive damage

---

[12] For at least two reasons, comparison of jury trial rights with the due process considerations of *Mathews v. Eldridge,* 424 U. 319 (1976), is completely misplaced. First, that case involved the complete absence of any process: the deprivation of disability benefits without prior notice or hearing. A full-blown civil jury trial presumes procedures far in excess of anything *Mathews* required. Second, a civil tort action is not a confrontation between the government and a citizen. It concerns private litigants, none of whom needs extra protection from accepted procedures and each of whom has an equal interest in a fair process that ensures a fair outcome. *See also* Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process,* 52 Ohio St. L. J. 859, 884-93 (1991), offering additional reasons.

awards do, this Court requires that the jury's discretion must be guided by appropriate legal standards. In *Haslip* and *TXO*, this Court upheld punitive damage verdicts in part because judicial review ultimately supplied the legal standards which the jury lacked, and a judge reviewed the evidence for compliance with those standards.[13] If this is what due process requires, Oregon has already provided it, both in guiding the jury's discretion and on judicial review.

3. Oregon trial and appellate practices meet due process requirements while upholding juries as legitimate factfinders.

Unlike many state court jurisdictions and in contrast to the Federal Rules of Civil Procedure, Oregon is not a notice pleading jurisdiction. ORCP 18 requires "a plain and concise statement of the ultimate facts constituting a claim for relief"; the Council on Court Procedures decided "to retain a requirement of fairly specific description of facts." Council on Court Procedures, Staff Comment to ORCP 18. Motion practice is frequent and defendants can and do seek dismissal (or, alternatively, orders to make more definite and certain) for failure to state ultimate facts sufficient to constitute a claim. ORCP 21A(8), 21D. The result, therefore, is that plaintiffs seeking both compensatory and punitive damages must allege the

---

[13] This Court has acknowledged that allowing judges to reweigh the evidence in the absence of precise standards does not solve the problem:

> One must concede that unlimited jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.

Pacific Mutual Life Insurance Co. v. Haslip, supra, 499 U.S. at 18. *See also* Wheeler, *supra* note 8, at 302-03:

> Although judges may indeed be more dispassionate, due process probably does not mandate that judges decide the size of punitive damages awards. . . . [A] change to judge-determined awards is based on speculation that one group of citizens — judges — are less likely to produce arbitrary or erroneous results than are other groups. . . . The choice between these two decisionmakers, therefore, seems to be one of legislative policy, not one of constitutional dimensions.

facts supporting their claims with great specificity, and mere conclusory assertions will not suffice. As a corollary, defendants to such claims have the advantage of knowing with some precision what facts they must counter at trial.

With respect to punitive damages, it is not unusual for trial courts to hold that the allegations, even if proved to be true, are insufficient to sustain a conclusion that defendant acted in "wanton disregard for the health, safety and welfare of others." *See, e.g., Davis v. Tyee Industries*, 295 Or. 467, 479, 698 P.2d 1186 (1983) (holding that "[w]here punitive damages are sought, the complaint should set forth the ultimate facts which are claimed to support the recovery of punitive damages"); *Holden v. Pioneer Broadcasting Co.*, 228 Or. 405, 418, 365 P.2d 845 (1961) (upholding a trial court's order striking the punitive damages allegation from the complaint as insufficient).[14]

Furthermore, plaintiffs are required to plead the amount of damages sought.[15] A verdict cannot exceed the amount pleaded, and the jury is so informed.[16] A plaintiff must therefore be willing to stand before a panel of Oregon jurors, well known to be conservative, and justify the amount of damages requested. A plaintiff who pleads an inordinate amount of damages finds the case contaminated by the appearance of avarice and must fear that the natural reaction of the jury will impair the claim. The law therefore creates an effective practical check on the amount of recovery a plaintiff seeks, which becomes a legal limit on the amount a plaintiff can recover.

By use of the summary judgment procedure, defendants may, and frequently do, test the ability of the plaintiff to prove the specific facts which plaintiff has been required to plead. ORCP

[14] For example, in contrast to Alabama (*see Haslip*, 111 S. Ct. at 1037 n.1), under Oregon law a pleading and proof of fraud is not, without more, sufficient to sustain recovery of punitive damages. *Schmidt v. Pine Tree Land Dev.*, 291 Or. 462, 631 P.2d 1373 (1981).

[15] ORCP 18B provides that a pleading shall contain "a demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated."

[16] *Wiebe v. Seely*, 215 Or. 331, 337, 335 P.2d 379 (1959).

47A. A partial summary judgment may therefore eliminate all or part of a claim for punitive damages prior to trial. A defendant has ample opportunity to gain notice prior to trial of the specific facts upon which a plaintiff is basing a claim for punitive damages.

At trial, defendants have an opportunity for a detailed *voir dire* of the jury; potential jurors can be challenged for cause if there is evidence of bias or prejudice; and each party has three peremptory challenges. ORCP 57.

Defendants can challenge the sufficiency of plaintiff's proof, both at the end of the plaintiff's case and at the conclusion of all the evidence; if there is no evidence to support an element of a claim, including a claim for punitive damages, it will not be submitted to the jury. ORCP 60. Under ORS 30.925(2) and ORS 41.315(2), evidence of a defendant's financial condition is not admissible until a plaintiff presents evidence sufficient to establish a prima facie right to punitive damages.

Defendants are entitled to appropriate instructions. In a products liability case, jurors must be informed of the statutory criteria[17] for making an award of punitive damages, and that

[17] ORS 30.925 provides:

(1) In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others.

(2) During the course of trial evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section.

(3) Punitive damages, if any, shall be determined and awarded based on the following criteria:

- (a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
- (b) The degree of the defendant's awareness of that likelihood;
- (c) the profitability of the defendant's misconduct;
- (d) The duration of the misconduct and any concealment of it;
- (e) The attitude and conduct of the defendant upon discovery of the misconduct;
- (f) The financial condition of the defendant; and
- (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations

punitive damages are not recoverable unless a plaintiff has proven wanton disregard by clear and convincing evidence. ORS 30.925(b). The jury was so informed in this case, and Honda did not take issue with these instructions. Pet. App. 22a n.11. In addition, a defendant who believes that the common law or the state or federal constitution requires other and different standards to be applied has an opportunity to request appropriate instructions, and a failure to give requested instructions can then be reviewed as an issue of law after the verdict. No such request was made in this case.

A defendant may ask that special interrogatories be submitted to a jury. ORCP 61. In a products liability punitive damages case, a defendant concerned that there is a failure of proof on any of the statutory criteria could ask that the criteria be submitted in the form of interrogatories to the jury. Sufficiency of the evidence to sustain a jury's answer, or an inconsistency between the answers, can then be examined as an issue of law both by the trial court after verdict and by the appellate courts. No such special interrogatories were requested in this case.

As discussed above, due process requires a verdict based on the evidence rendered by an impartial tribunal and not arbitrarily. Thus, in Oregon a damage award that is not based on the evidence cannot stand. It may be excessive or it may be inadequate, but in Oregon if there is "[i]nsufficiency of the evidence to justify the verdict or other decision, or . . . it is against law,"[18] the trial judge directs a new trial. ORCP

similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

[18] This is the same standard for a new trial, in almost identical words ("against all the evidence" or "against law"), as that used in English common law cases in the mid- to late-1700s. Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 311 (1966). As Henderson's research reveals, there was no generally recognized English common law practice that a trial judge could set aside a verdict because the judge found it against the weight of the evidence. *Id.* 311-12.

The diversity of practice in the American states was even more pronounced. The American states from the beginning balanced the powers of judge and jury in diverse ways. The broad diversity in civil jury practice at the time of the enactment of the federal constitution made it impossible to draft

64B(5). Similarly, a damage award imposed by a biased jury cannot stand. Jury bias, or the fear of it, may be a part of what Honda labels "excessiveness." In Oregon a verdict based on "[i]rregularity in the proceedings of the . . . jury" and "misconduct of the jury," will be sent back for new trial. ORCP 64 B(1) and (2). Post trial as well as before submission to the jury, a defendant may test the sufficiency of evidence to support each of the criteria if a special verdict form has been submitted requesting the jury's answer to the statutory questions. A failure of evidence on any of these points is subject to judicial review and reversal for new trial.

The role of Oregon judges in reviewing law and fact in punitive damage awards is shown by *Andor v. United Air Lines*, 303 Or. 510, 739 P.2d 18 (1987), a damage action by a passenger of a United flight that crashed before reaching the Portland, Oregon airport. A jury awarded both compensatory and punitive damages under instructions using standard formulations of "willfull or wanton disregard of risk . . . amounting to deliberate disregard of the rights and safety of others." The trial court set aside the jury verdict for punitive damages for lack of adequate evidence. 303 Or. at 505-07. The Oregon Supreme Court affirmed the trial court's action, holding that the several discrete instances of substandard, but not "wanton," actions by a number of United's personnel could not be cumulated into wilfully irresponsible performance by the defendant organization as a whole. *Id.* at 512-16.

Andor did not involve the amount of punitive damages, but the case shows how the Oregon Supreme Court would approach review of that issue if a party laid the proper foundation for review. Justice Linde's opinion for the unanimous court expressed criticism of the standard practice of litigants to blend facts and legal standards in blanket jury instructions without

a civil jury trial right in the original constitution. Two years later, language general enough to encompass all states' practices appeared as the Seventh Amendment in the Bill of Rights. *See* Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 Geo. Wash. L. Rev. 723, 742-45 (1993).

regard to the nature of the defendant or the defendant's conduct or the purposes that punitive damages were designed to serve in one type of case as compared with another type.[19] That discussion concluded:

> Perhaps more differentiated jury instructions should be developed to identify the factual elements on which punitive damages depend in essentially different types of cases, but the instructions here are not in issue. Rather the present formulas require attention to the judicial role in determining whether in the particular pattern before the court there is a factual basis for each necessary element on which a factfinder may award punitive damages.

Id. at 511-12 (footnote omitted). Footnote eight to this passage cited the criteria for punitive damages in the products liability statute, ORS 30.925 (*see* note 17, *supra*), as an example how the factual elements of punitive damages could be differentiated.

Similarly, Honda in the present case might have submitted to the trial court a proposed, more differentiated, interpretation of how the statutory criteria of ORS 30.295 should be applied and quantified. It might have asked for a special verdict form on which the jury would respond to whatever analysis the trial court submitted to it. See *Andor*, 303 Or. at 512-13. The trial court's ruling on such a request would have been an issue of law and would have been reviewed as an issue of law on an appeal by the

---

[19] Justice Linde pointed out:

> United's petition for review is directed to the adequacy of the evidence rather than to the phrasing of the instructions. The parties' briefs, however, compare the facts in this case with the facts and the opinions in other cases in which this Court has allowed or disallowed awards of punitive damages. Doubtless there has been in review of punitive damages the blending of facts and legal standards, of the roles of courts and juries, to which the Court of Appeals referred. They are not easily disentangled.
>
> We do not here review in detail the many cases quoted by the parties. The problem of disentangling facts and legal standards arises because judicial statements of criteria for punitive damages have sought to encompass very different situations in one general formulation.

303 Or. at 510.

losing party. Assuming a proper trial court ruling on the request, the trial court then would have been called upon to scrutinize whether there was evidence to support each element of the claimed amount of punitive damages, in the same manner as the trial court did in *Andor*, and this ruling in turn would have been reviewed on appeal in the same manner as in *Andor*. In no way would such a trial or appellate procedure fall short of due process. But in this case, as in *Andor*, the defendant did not avail itself of these procedural opportunities to sharpen the statutory standards for appropriate punitive damages, and then to have the evidentiary support for each element of the standards judicially reviewed.

CONCLUSION

Dimick v. Schiedt, 293 U.S. 474, 482 (1934), summarized the common law procedures for awarding and reviewing a jury's damage verdict and concluded: "[A litigant] is entitled to an assessment by a jury which acts properly." Oregon assures that its juries act properly in the many ways enumerated above. Article VII, § 3 was not intended, and in this case clearly was not applied, to permit a jury to render any verdict it chose. The jury's discretion to award compensatory and punitive damages was guided by instruction. The instructions derive from standards developed by courts and, in the case of punitive damages in this product liability case, enacted by the legislature. The court's post-verdict review to ensure the adequacy of evidence to support these legal standards fully meets due process requirements.

Respectfully submitted,

KATHRYN H. CLARKE
Counsel of Record
MAUREEN LEONARD
921 SW Washington
Suite 764
Portland, OR 97205
(503) 224-7963

March 31, 1994

Counsel for *Amicus Curiae*